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No. 86-130

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

VICKIE LORENE ROCK ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Respondent, the State of Arkansas, is in general agreement with statement of the case made by petitioner Rock. However, respondent Arkansas wishes to correct two inaccurate statements made by petitioner Rock in her statement of the case. Respondent Arkansas notes that Rock *was* permitted at trial to relate to the jury certain facts that were not contained in her hypnotist's intake notes. Respondent Arkansas notes further that *not* all of the points raised in Rock's brief on the merits were raised at the trial court level or argued to the Arkansas Supreme Court. Those issues that are procedurally barred will be discussed in respondent's argument section.

SUMMARY OF THE ARGUMENT

Hypnotically refreshed testimony is inherently unreliable. Such testimony is based on the enhancement, while under hypnosis, of an individual's memory. According to the overwhelming weight of eminent scientific authority, individuals under hypnosis are very vulnerable to suggestion, feel compelled to remember events in the way that would please the hypnotist and are prone to fabricate details of the event that they are asked to remember. These dangers are increased when the individual has a motive for remembering the events that are the subject of the hypnotic session in a particular way. Use of certain procedural safeguards during hypnosis does not prevent the subject's recollection from becoming inaccurate. Hypnotic refreshment of memory leads to a firm conviction on the part of the hypnotized subject that the events that were the subject of the hypnotic session actually occurred in the way the subject remembered them while hypnotized.

Criminal defendants do not have an absolute right, guaranteed by the Due Process Clause of the Fourteenth Amendment, to testify in whatever manner they please. Due process is not a license to deceive the jury, albeit unintentionally. Given the facts of the instant case, Arkansas' interest in safeguarding the truth-finding ability of Rock's jury, thereby insuring that the jury's verdict would be based on the collective, reasoned judgment of the jurors, should outweigh Rock's right to present to the jury, by her own testimony, inherently unreliable, exculpatory evidence. *See Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973).

Rock's argument concerning Arkansas' interference with her right to effective assistance of counsel is moot. In any case, this Court has no jurisdiction to hear and decide this argument. This Court has no jurisdiction because Rock did

not raise this point before the Arkansas Supreme Court. *Beck* v. *Washington*, 369 U.S. 541, 549-54 (1962). Furthermore, Rock has failed to show any prejudice she suffered as a result of the alleged interference.

The trial court applied its pretrial order restricting Rock's testimony so loosely that Rock was able to testify based upon sources other than her hypnotist's intake notes. The trial court did not apply its pretrial order restricting Rock's testimony in an arbitrary way. *Washington* v. *Texas*, 388 U.S. 14, 22 (1967).

Rock's other arguments were not raised at the trial level or were not asserted before the Arkansas Supreme Court. Given Rock's failure to obtain a decision on these cases in state court, this Court lacks jurisdiction to hear and decide these claims. *Cardinale* v. *Louisiana*, 394 U.S. 437, 438-39 (1969).

ARGUMENT

I.

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW IN THAT THE PRETRIAL ORDER OF THE COURT WAS NOT AN UNCONSTITUTIONAL LIMITATION ON PETITIONER'S RIGHT TO TESTIFY IN HER OWN DEFENSE.

A. *Introduction.*

Petitioner Rock argues that the trial court violated her Sixth and Fourteenth Amendment due process right to testify in her own defense when it limited the testimony she could present at trial. The trial court limited Rock's testimony because her memory of the events in question had been enhanced by hypnosis. According to the trial court, hypnosis had made Rock's memory of the events leading up to her husband's death unreliable. (Rock's petition for certiorari at xvii) The trial court's pretrial order indicated that Rock could testify only to those facts she told her hypnotist, Dr. Bettye Back, just before Back hypnotized her. At trial, the trial court applied its order in a very lenient way that permitted Rock to recount facts that were not in the notes taken by Dr. Back. (J.A. 36) Respondent Arkansas respectfully submits that the trial court's belief in the complete unreliability of Rock's hypnotically bolstered memory was well founded. Respondent Arkansas respectfully submits that the inherent unreliability of hypnotically enhanced memory and in-court testimony based thereon pose a threat to the truth-finding function of juries. Hypnotically refreshed testimony has such a potentially corrupting effect on the ability of jurors to detect the truth that states may limit the due process right of criminal defendants to testify in their own defense; such a restriction should be tailored to limit only that part of the defendant's testimony

that was the product of hypnotic refreshment. At the very least, if states may not bar a criminal defendant's hypnotically enhanced testimony, then due process concerns do not keep states from requiring, as a matter of their respective witness competency statutes or case decisions, that criminal defendants be hypnotized in accordance with strict guidelines before being allowed to give hypnotically enhanced testimony to a jury. To show the utter unreliability of hypnotically refreshed testimony, some examination of the many lower court decisions on point is necessary as well as a brief description of the hypnotic state.

There is no single, generally accepted definition of the hypnotic state nor is there a single, agreed upon underlying theory that explains it. B. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 Cal. L. Rev. 313, 316-21 (1980) (hereinafter cited as Diamond, *Inherent Problems*). At a minimum, hypnosis involves a cooperative subject and a hypnotist. The hypnotist performs some kind of induction procedure in order to bring about the hypnotic state. During the induction of the hypnotic state the hypnotist invites the subject to suspend his critical judgment and be open to suggestion. The hypnotic state is achieved when the subject successfully accomplishes a series of test suggestions involving alteration of perception, motor control or memory. The subject is truly hypnotized when the responses to the hypnotic suggestions are experienced by the subject as real and involuntary. In summary, hypnosis involves the focusing of attention; increased responsiveness to suggestion; suspension of disbelief with a lowering of critical judgment; potential for altering perception, motor control or memory in response to suggestion; and the subjective experience of responding involuntarily. Council on Scientific Affairs, A.M.A., *Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 253 J.A.M.A. 1918, 1919 (1985); *see also* IX Encyclopaedia Britannica, *Hypnosis*, 133, 136-37 (15th ed. 1974).

The lower court cases discussing the admissibility of hypnotically refreshed testimony fall into three categories: (1) hypnotically refreshed testimony held admissible; (2) hypnotically refreshed testimony held admissible if certain procedural safeguards were in place during the hypnotic session; and (3) hypnotically refreshed testimony held inadmissible. Decisions in the third category of cases do not hold that witnesses who have had their memories hypnotically enhanced are totally incompetent to testify — these courts permit a hypnotically refreshed witness to testify to events that the witness could remember *before* undergoing hypnosis. In the following subsections these three categories of cases will be discussed.

B. *Admissibility of hypnotically refreshed testimony in lower federal and state courts.*

1. *Complete admissibility.*

Ten federal or state lower courts have held that hypnotically enhanced testimony is admissible with no restriction on the hypnotically refreshed witness' testimony. The pertinent decisions of these courts are as follows: *Beck* v. *Norris*, 801 F.2d 242, 244-5 (6th Cir. 1986); *United States* v. *Awkard*, 597 F.2d 667, 669 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979); *United States* v. *Adams*, 581 F.2d 193, 198 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978); *Kline* v. *Ford Motor Co., Inc.*, 523 F.2d 1067, 1069-70 (9th Cir. 1975); *Wyller* v. *Fairchild Hiller Corp.*, 503 F.2d 506, 509 (9th Cir. 1974); *United States* v. *Waksal*, 539 F.Supp. 834, 838 (S.D. Fla. 1982), *rev'd on other grounds*, 709 F.2d 653 (11th Cir. 1983); *United States* v. *Narciso*, 446 F.Supp. 252, 277-82 (E.D. Mich. 1977); *People* v. *Smrekar*, 68 Ill. App. 3d 379, 385 N.E.2d 848, (1979); *State* v. *Wren*, 425 So.2d 756, 759 (La. 1983); *State* v. *Brown*, 337 N.W.2d 138, 151 (N.D. 1983);

State v. *Jorgensen*, 8 Or. App. 1, 9, 492 P.2d 312, 315 (1971); *State* v. *Glebock*, 616 S.W.2d 897, 903-04 (Tenn. Crim. App. 1981); *Chapman* v. *State*, 638 P.2d 1280, 1282 (Wyo. 1982); *see also* Oregon Rev. Stat. § 136.675 (Repl. 1985); *see generally* Annot., 92 A.L.R.3d 442 (1979) (collecting cases); E. Cleary, *McCormick on Evidence* § 206(C) (1984 3rd ed.) (collecting cases); and P. Giannelli and E. Imwinkelried, *Scientific Evidence* §§ 12-3-4(C) (1986) (collecting cases) (hereinafter cited as Giannelli, *Scientific Evidence*).

When synthesized, these cases establish a rule of general admissibility for hypnotically refreshed testimony. These cases consider hypnosis simply a means to stimulate a witness's memory just like any other means — for example, a writing or a unique sound or odor. These cases hold that cross-examination of the hypnotically enhanced witness, presentation of expert testimony by the adverse party explaining to the jury the capacity of hypnosis to distort memory and proper cautionary instructions to the jury are all that is necessary to safeguard the jury's truth-finding ability. According to these cases, hypnotic enhancement of testimony goes to the weight, not the admissibility, of the testimony.

The continuing authority of many of these cases is dubious because they were decided before several eminent authorities in the field of hypnosis published articles, in which they state that hypnotically refreshed testimony is unreliable. Giannelli, *Scientific Evidence* at 359. Indeed, state supreme courts in Maryland and North Carolina both overruled earlier cases holding that hypnotically enhanced testimony was unconditionally admissible with subsequent decisions holding that hypnotically bolstered testimony is inadmissible, but both courts permit a hypnotically refreshed witness to testify on the basis of his or her pre-hypnosis memory. *Collins* v. *State*, 296

Md. 670, 464 A.2d 1028 (1983), *overruling Harding* v. *State*, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969) and *State* v. *Peoples*, 311 N.C. 515, 532, 319 S.E.2d 177, 187 (1984), *overruling State* v. *McQueen*, 295 N.C. 96, 119-22, 244 S.E.2d 414, 427-29 (1978). *Harding*, a 1968 decision, was an especially influential case that other jurisdictions relied on in concluding that hypnotically enhanced testimony was admissible. A factor in the North Carolina Supreme Court's decision to overrule *McQueen* was the decision of the Maryland Supreme Court to overrule *Harding*. *Peoples*, *supra*, 311 N.C. at 532, 319 S.E.2d at 187.

Furthermore, the use of hypnosis is not akin to other methods of refreshment of memory — the process of placing a subject under hypnosis, by definition, renders the subject highly suggestible. This heightened state of suggestibility makes the subject more vulnerable to suggestion than he would be otherwise and thereby increases the chance that the subject will recall events inaccurately. *See People* v. *Hughes*, 466 N.Y.S.2d 255, 265, 453 N.E.2d 484, 494 (1983). In addition, the assumption that cross-examination acts as a kind of scalpel that cuts through deception and irrelevancy and gets to the truth does not obtain for witnesses whose memories have been hypnotically refreshed. Hypnotic enhancement blunts cross-examination. It does so by producing in the witness a firm belief in the accuracy of his recollection of the events in question. When the witness truly believes in the truth of his testimony, he projects outward, indicia of his belief in the truth of his testimony; the core of the jury system is the assumption that jurors can evaluate testimony for its truthfulness based, in part, on their common sense understanding of these outward manifestations of credibility. *Ballew* v. *Georgia*, 435 U.S. 223, 232-33 (1978). Jurors cannot rely on the outward manifestations of credibility given off by hypnotically enhanced witnesses. *See People* v. *Shirley*, 181 Cal. Rptr. 243, 272, 641

P.2d 775, 803-04, *cert. denied*, 459 U.S. 860 (1982); *State* v. *Martin*, 101 Wash.2d 713, 722, 684 P.2d 651, 656 (1984); Diamond, *Inherent Problems* at 339-40; and M. Orne, *The Use and Misuse of Hypnosis in Court*, 27 Internat. J. of Clinical and Experimental Hypnosis 311, 320, 327, 332 (1979) (hereinafter cited as Orne, *The Use and Misuse*).

2. *Procedural safeguards cases.*

Ten lower courts admit hypnotically enhanced testimony if the witness was hypnotized in accordance with certain procedural safeguards. The pertinent decisions are as follows: *Sprynczynatyk* v. *General Motors*, 771 F.2d 1112, 1119-23 (8th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 1263, 89 L.Ed.2d 572 (1986); *United States* v. *Harrington*, 18 M.J. 797, 803 (A.C.M.R. 1984); *United States* v. *Valdez*, 722 F.2d 1196, 1203 (5th Cir. 1984); *Idaho* v. *Iwakiri*, 106 Idaho 618, 625-26, 682 P.2d 571, 578-79 (1984) (*applying a modified procedural safeguards analysis*); *Pearson* v. *State*, 441 N.E.2d 468, 473 (Ind. 1982); *House* v. *State*, 445 So.2d 815, 826-27 (Miss. 1984); *State* v. *Hurd*, 86 N.J. 525, 432 A.2d 86 (1981); *State* v. *Beachum*, 97 N.M. 682, 689-90, 643 P.2d 246, 253-54 (N.M. App. 1981), *writ quashed*, 98 N.M. 51, 644 P.2d 1040 (1983); *State* v. *Weston*, 16 Ohio App.3d 279, 287, 475 N.E.2d 805, 813 (1984); *State* v. *Armstrong*, 110 Wisc. 2d 555, 571-73, 329 N.W.2d 386, 394-95, *cert. denied*, 461 U.S. 946 (1983). The leading case of this line is the New Jersey Supreme Court's *Hurd* decision.

In *Hurd* the New Jersey Supreme Court held that hypnotically refreshed testimony was so unreliable that it could not be admitted into evidence unless six procedural safeguards were employed during the hypnotic session. However, before determining whether the safeguards were observed, a trial court must first determine whether the use of hypnosis is appropriate for the kind of memory loss suffered by the subject. Once the trial court determines that the subject's

memory loss can be remedied by hypnosis, then the trial court is to determine whether the procedural safeguards were observed. These safeguards are: 1) a psyciatrist or psychologist experienced in the use of hypnosis must conduct the hypnotic session; 2) the psychiatrist or psychologist should be independent of the government and the defense and not regularly employed by either; 3) any information given to the hypnotist by the government or defense counsel must be recorded in writing or in a suitable form; 4) before inducing hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them — in obtaining this description the hypnotist should avoid influencing it; 5) all contacts between the hypnotist and the subject must be recorded — videotape is strongly encouraged and 6) only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and post-hypnotic interview. The party proffering the hypnotically refreshed testimony must establish its reliability by clear and convincing evidence.

The *Hurd* approach of erecting procedural safeguards cannot guarantee that hypnotically refreshed testimony will be reliable. In the first place, the safeguards themselves simply are not adequate. *See People* v. *Shirley*, 181 Cal. Rptr. 243, 255 n.24, 641 P.2d 775, 787 n.24, *cert. denied*, 459 U.S. 860 (1982). Furthermore, the *Hurd* safeguards do not prevent a subject from losing his critical judgment, do not prevent confusion between actual memory and confabulated, false memories and do not prevent the subject's projection of complete belief in the accuracy of his post-hypnosis memory. *Shirley*, *supra* and *People* v. *Gonzales*, 415 Mich. 615, 624, 329 N.W.2d 743, 746-7 (1982), *modified on other grounds*, 417 Mich. 968, 336 N.W.2d 751 (1983). Moreover, use of the *Hurd* procedural safeguards approach has enormous potential to delay the criminal justice system at trial and by interlocutory appeal, given its reliance on expert testimony, on special hearings and on the ability of trial judges to make difficult decisions on the basis of their

understanding of complex scientific issues relating to the processes of memory. *State ex rel. Collins* v. *Superior Court*, 132 Ariz. 180, 208, 644 P.2d 1266, 1294 (1982) and *Shirley*, *supra*.

With respect to the facts of the instant case, respondent Arkansas submits that the *Hurd* safeguards were not strictly followed and that the Arkansas Supreme Court so held. *Rock* v. *State*, 288 Ark. 566, 573-74, 708 S.W.2d 78, 82 (1986). In the first place, Dr. Bettye Back had been employed by Rock's trial attorney in the past, a violation of the second *Hurd* safeguard. (T. 993-94) Dr. Back also admitted that Rock's trial attorney had told her *over the telephone* certain information about Rock, a violation of the third *Hurd* safeguard. (J.A. 60-2). Dr. Back's version of what Rock's trial counsel said is no substitute for an accurate tape recording of the information that counsel conveyed to her. Finally, the fifth *Hurd* safeguard states that *all* contacts between the subject and the hypnotist should be recorded, videotaped if possible. Dr. Back did not videotape any of her contacts with Rock, although she made an audiotape of the hypnotic sessions (which she admits is difficult to understand). Dr. Back did not even audiotape any of her pre-hypnosis, information — taking interviews with Rock. (J.A. 51-3; J.A. 80; T. 996-97)

Finally, *Hurd* notes that an important factor that a trial court should consider in determining whether the victim's memory loss is the sort that can be helped by hypnotic enhancement is whether the subject had a motive for remembering a particular version of the events in question. *Hurd*, *supra*, at 86 N.J. at 544, 432 A.2d at 96. Rock was aware, before she was hypnotized, that she was undergoing the process at her lawyer's insistence to help her remember what occurred when she shot her husband. (J.A. 47-8; J.A. 80; T. 1002)

If this Court were to decide that due process of law

requires that defendants in criminal cases be allowed to testify if *Hurd*-like procedural safeguards were employed while the defendant was hypnotized, then Rock's due process right to testify in her own defense was not violated at her trial. Rock's right to testify in her own defense was not violated because the *Hurd* safeguards were not properly employed when Dr. Back hypnotized her in order to refresh her recollection of the events leading up to her husband's death.

3. *General inadmissibility cases*

Twenty-two lower courts hold that hypnotically refreshed testimony is inadmissible. The pertinent decisions are as follows: *Prewitt* v. *State*, 460 So.2d 296, 302-304 (Ala. Crim. App. 1984); *Contreras* v. *State*, 718 P.2d 129, 138 (Alaska 1986); *State ex rel. Collins* v. *Superior Court*, 132 Ariz. 180, 193-211, 644 P.2d 1266, 1279-97 (1982); *State* v. *Mena*, 128 Ariz. 226, 231, 624 P.2d 1274, 1279 (1981); *Rock* v. *State*, 288 Ark. 566, 708 S.W.2d 778 (1986); *People* v. *Guerra*, 208 Cal. Rptr. 162, 690 P.2d 635 (1985); *People* v. *Shirley*, 181 Cal. Rptr. 243, 254-55, 641 P.2d 755, 786-87, *cert. denied*, 459 U.S. 860 (1982); *People* v. *Quintanar*, 659 P.2d 710, 711 (Colo. App. 1982); *State* v. *Atwood*, 479 A.2d 258 (Conn. 1984); *State* v. *Davis*, 490 A.2d 601, 605 (Del. 1985); *Bundy* v. *State*, 471 So.2d 9, 18 (Fla. 1985); *cert. denied*, ___ U.S. ___, 107 S.Ct. 295, 93 L.Ed. 2d 269 (1986) (Brennan, J. dissenting from denial); *State* v. *Moreno*, 709 P.2d 103 (Hawaii 1985); *State* v. *Haislip*, 701 P.2d 909 (Kan. 1985); *State* v. *Collins*, 296 Md. 670, 701-02, 464 A.2d 1028, 1044 (1983): *Commonwealth Kater*, 388 Mass. 519, 447 N.E.2d 1190, 1195 (1983); *People* v. *Gonzales*, 415 Mich. 615, 627, 329 N.W.2d 743, 748 (1982), *modified on other grounds*, 417 Mich. 968, 336 N.W.2d 751 (1983); *State* v. *Ture*, 353 N.W.2d 502, 513 (Minn. 1984); *State* v. *Mack*, 292 N.W.2d 764, 772 (Minn. 1980); *Alsbach* v. *Badar*, 700 S.W.2d 823 (Mo. 1985); *Palmer* v. *State*, 210 Neb. 206, 218, 313 N.W.2d 648, 655 (1981); *People* v.

Hughes, 466 N.Y.S.2d 255, 261-65, 453 N.E.2d 484, 490-95 (1983); *Robison* v. *State*, 677 P.2d 1080, 1085 (Okla. Crim. App.), *cert. denied*, 467 U.S. 1246, (1984); *Commonwealth* v. *Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981) and *State* v. *Martin*, 101 Wash.2d 713, 722, 684 P.2d 651, 654 (1984).

According to these lower court authorities, testimony based on the hypnotic enhancement of a witness' memory is so unreliable that it is not admissible into evidence. Ultimately, these cases rest on the views of a number of scientific experts, notably Drs. Martin Orne and Bernard Diamond, who have written a great deal on the subject of hypnotically refreshed testimony. These cases do not hold, and the Arkansas Supreme Court did not hold, that a hypnotically refreshed witness is totally incompetent and cannot testify at all. The above jurisdictions permit hypnotically refreshed witnesses to testify to those events that the witness can prove he or she was able to remember before hypnosis or to events that are unrelated to the events that were the subject of hypnosis. *Cf. Shirley, supra*, 181 Cal. Rptr. at 273, 641 P.2d at 805 *with Martin, supra*, 101 Wash. 2d at 222, 684 P. 2d at 656 and *State ex rel. Collins, supra*, 132 Ariz. at 209, 644 P.2d at 1295; *see* Giannelli, *Scientific Evidence, supra*, at 357 nn. 51-4.

Although the above cases all hold that hypnotically refreshed testimony is inherently unreliable and so hold on the basis of expert opinion, they do not all apply the same evidentiary analysis to exclude it. Some jurisdictions apply a "probative value versus unfair prejudice" balancing test like that found in FRE 403 and others apply the holding of *Frye* v. *United States*, 293 F. 1013 (D.C. Cir. 1923). *See* Giannelli, *Scientific Evidence, supra* at § 1-5(E), nn. 117-18. *Frye* holds, in essence, that the results of scientific tests are admissible only if they are produced by scientific techniques that are generally accepted by the relevant scientific community. Respondent Arkansas will not address the *Frye* rule because the Arkansas

Supreme Court found hypnotically refreshed testimony inadmissible as a matter of the *Frye* test or of the "balancing test" approach of FRE 403. *Rock, supra,* 288 Ark. at 570, 708 S.W.2d at 80 [on the *Frye* standard generally, *see* E. Cleary, *McCormick on Evidence* § 203 (3d ed. 1984) and Giannelli, *Scientific Evidence, supra,* at §§ 1-5-5(F)].

The expert opinions most frequently relied on are set forth in M. Orne, *Use and Misuse, supra* and B. Diamond, *Inherent Problems, supra; see also* M. Orne, D. Soskis, D. Dinges and E. Orne, *Hypnotically Induced Testimony* in Eyewitness Testimony: Psychological Perspectives, V171 (G. Wells and E. Loftus eds. 1984) and M. Orne, D. Soskis, D. Dinges and E. Orne, *Hypnotically Refreshed Testimony: Enhanced Memory or Tampering with Evidence?* (United States Dept. of Justice, Nat. Institute of Justice, Issues and Practices in Criminal Justice series 1985). These experts state that hypnotically refreshed testimony is inherently unreliable because the hypnotized subject is vulnerable to hypersuggestibility, hypercompliance and confabulation.

By definition, when subjects are hypnotized, they are extremely receptive to suggestions given by the hypnotist. *Shirley, supra,* at 181 Cal. Rptr. at 271, 641 P.2d at 802. Suggestions from the hypnotist may come in unintended forms — requests for predictions from the hypnotist or the unconscious nonverbal behavior of the hypnotist. Dr. Back acknowledged this hazard in her testimony. (J.A. 50-1; 70) A classic example of hypersuggestiveness occurred in the instant case when Rock remembered cocking the hammer on the pistol she used to shoot her husband. At J.A. 94-5 Dr. Back admitted that when she hypnotized Rock a second time and asked her if she had cocked the hammer on the pistol, Rock replied that she had. At J.A. 73-7 Dr. Back admitted that when she hypnotized Rock for the first time she did not ask her if she had cocked the hammer on the pistol because she, Dr. Back, did not know

enough about pistols to know that some pistols did not have to be cocked. Before the second hypnotic session Rock had never mentioned cocking the pistol. (J.A. 75) After the second hypnotic session, after Dr. Back had learned that only *some* pistols have to be cocked, Rock was able to "remember" that she had cocked the pistol. (J.A. 95) Had Dr. Back never learned from an outside source that only some pistols have to be cocked, Rock would never have "remembered" such a detail.

Hypercompliance is another way in which hypnotically refreshed memory can be rendered inaccurate. Subjects under hypnosis may feel compelled to please the hypnotist or others who have told the subject that it is important that he or she remember accurately. *See Gonzales, supra,* 415 Mich. at 624, 329 N.W.2d at 746 and *State* v. *Hurd,* 86 N.J. 525, 539, 432 A.2d 86, 93 (1981). Rock knew that her lawyers wanted to have her hypnotized so she could remember the details surrounding her husband's death in an effort to help them prepare her defense. (J.A. 48; J.A. 80; J.A. 110) Rock must have felt a compelling desire to assist her attorney and was, therefore, vulnerable to hypercompliance. Dr. Back admitted that a subject's motivation may affect how the subject responds during hypnosis and that hypercompliance is possible. (J.A. 80; J.A. 86-7)

Finally, hypnotized subjects are likely to confabulate. Confabulation occurs when a subject under hypnosis, unable to remember specific details, simply fantasizes an answer to complete his or her story. *See State ex rel. Collins, supra,* 132 Ariz. at 201, 644 P.2d at 1270-71. Dr. Back admitted that subjects under hypnosis can confabulate, and that confabulated statements are difficult to detect without independent verification. (T. 978-79; T. 984) Dr. Back admitted that she did not independently verify any of the information that Rock gave her. (T. 978-89) Indeed, the crucial events surrounding Rock's husband's death could never have been independently verified because Rock's husband had died and because Rock could not independently remember the details.

Respondent Arkansas submits that hypersuggestibility, hypercompliance and confabulation all make a hypnotized subject's memory of an event completely unreliable. If the subject's memory becomes unreliable then, perforce, the subject's subsequent in-court testimony, based upon his hypnotically enhanced memory, is unreliable. Arkansas, like all the states and the United States, structures its rules of evidence to keep unreliable evidence from the jury in a criminal trial. Respondent Arkansas submits that the due process clause of the Fourteenth Amendment does not prohibit Arkansas from establishing a rule of partial witness incompetency with respect to hypnotically refreshed testimony and applying such a rule to criminal defendants.

C. *The defendant's due process right to testify in her own defense.*

Respondent Arkansas asserts that Rock's hypnotically refreshed testimony was inherently unreliable. Respondent Arkansas asserts that the Arkansas Supreme Court's *Rock* decision is an appropriate evidentiary limitation on the competency of a hypnotically refreshed defendant in a criminal case to testify on her own defense. Rock asserts that she has a Fourteenth Amendment due process right to testify in her own defense that should override Arkansas' evidentiary rule. Rock unquestionably has a general due process right to testify in her own defense at trial that the state cannot completely restrict. *Nix* v. *Whiteside*, 475 U.S. ___, 106 S.Ct. 988, 993, 1004-05 n.5, 89 L.Ed.2d 123, 133, 147 n.5 (1986); it is just as certain that Rock cannot testify in her own defense in whatever manner she pleases. *Nix, supra*, 106 S.Ct. at 998, 89 L.Ed.2d at 138 and *Harris* v. *New York*, 401 U.S. 222, 225 (1971). This Court must decide, as it must so often, whether the rights of society or the rights of an individual crimin defendant shall prevail. Respondent Arkansas respectf

submits that this Court should resolve this issue by applying the analysis this Court employed in *Chambers* v. *Mississippi*, 410 U.S. 284 (1973).

A Mississippi jury convicted Leon Chambers of murdering a police officer. After the Mississippi Supreme Court affirmed Chambers' conviction, this Court granted Chambers' petition for a writ of certiorari. In its decision, this Court invalidated, on due process grounds, two state rules of evidence. The first unconstitutional rule was Mississippi's voucher rule that prohibited Chambers from cross-examining his own witness. Mississippi also did not allow statements made against penal interest as an exception to its hearsay rule. This non-exception to the hearsay rule kept Chambers from introducing exculpatory testimony from three witnesses who would have repeated in court, the out-of-court confession of one Gable McDonald to the murder of the police officer. This Court held that the voucher rule denied Chambers his due process right to confront witnesses by cross-examination and that the inclusion of statements against penal interest within the hearsay rule denied Chambers his due process right to present testimony in his own defense.

This Court reached its decision by holding that a criminal defendant's due process rights were not absolute and must, when necessary, bow to accommodate the state's legitimate interests in the criminal trial process. *Chambers, supra,* at 295. Furthermore, this Court noted that the competing interests of the defendant and the state must be closely examined if the denial of the defendant's rights would undermine the "integrity of the fact finding process." *Chambers, supra,* at 295.

In the instant case, Rock does not argue that her hypnotically enhanced testimony was reliable. The facts of the case show that Rock knew why she was to be hypnotized and that she knew it would be to her advantage to recall the events

in question favorably. Expert opinion states that hypnotically refreshed testimony is not reliable, particularly when procedural safeguards are not strictly followed, as they were not followed in the instant case. In *Chambers*, this Court stressed that the excluded hearsay evidence was very reliable and gave great weight to "reliability" in striking the balance in favor of Chambers' right to present the hearsay evidence. *See Chambers, supra*, at 299-300. In several other cases this Court has attached great weight to the reliability of evidence in determining the extent of constitutional rights of criminal defendants. *See United States* v. *Inadi*, 475 U.S. ___, 106 S.Ct. 1121, 1126-27, 89 L.Ed. 2d 390, 398-9 (1986) (nontestifying co-conspirator need not be unavailable as a condition for admission of his out-of-court statements); *Mancusi* v. *Stubbs*, 408 U.S. 204, 213-14 (1972) (indicia of reliability must be present before hearsay testimony of an unavailable witness is admissible); and *Dutton* v. *Evans*, 400 U.S. 74, 88-9 (1970) (same).

In *Chambers* this Court considered not only the reliability of the hearsay evidence at issue, but also the interest of Mississippi in refusing to except statements against penal interest from its hearsay rule. Given the facts of *Chambers*, this Court held that Mississippi's interest in seeing that out-of-court statements against penal interest did not come into evidence was minimal. Arkansas' interest in the instant case is substantial. Arkansas' interest lies in its ability to establish rules of evidence that protect the truth-finding function of the jury and, thereby, enable the jury to make decisions rationally. *Cf. Washington* v. *Texas*, 388 U.S. 14, 22-3 (1967) (Texas' rule of witness incompetency for co-defendants found violative of due process because of their irrational distinctions with respect to classes of witnesses likely to commit perjury). Arkansas must have the right to insure that juries reach verdicts in criminal cases on the basis of logical inference, not guesswork.

Arkansas cannot protect this interest, given the facts of this case, in any way except by exclusion of Rock's testimony based on her hypnotically enhanced memory. At trial, Arkansas had no other witnesses to the crime to present to the jury. Arkansas could not have cross-examined Rock at trial on her pre-hypnosis memory of the few moments in which she shot her husband to death because she had no such memory (J.A. 62-4). In any case, because Rock had already been hypnotized *before* trial, at trial her then present recollection of her pre-hypnosis memory was tainted by hypnosis such that the jury would not have been able to tell what part of Rock's testimony was the product of her actual, pre-hypnosis memory and what part was the product of hypnotic enhancement. *See State ex rel. Collins, supra,* 132 Ariz. at 201, 644 P.2d at 1292 and *Shirley, supra,* 181 Cal. Rptr. 271-72, 641 P.2d at 803. Arkansas could not even ask the trial court for a special instruction regarding the weight of Rock's hypnotically refreshed testimony because the trial court cannot, as a matter of the Arkansas Constitution, comment on the weight that the jury should accord testimony. See *Weatherford* v. *State,* 286 Ark. 376, 380-81, 692 S.W.2d 605, 607 (1985) and *Skaggs* v. *State,* 234 Ark. 510, 353 S.W.2d 3 (1962). If such a judicial comment on the weight of Rock's testimony were possible in Arkansas, it would take the incongruous form of the trial court telling the jury that the more confident of the truth of her testimony that Rock seems to be, the more likely it is that her testimony is unreliable — at the very least the trial court would have to instruct the jury that it could not rely on its normal, common sense notion of credibility in evaluating Rock's testimony. Such an instruction could not protect Arkansas' interest in having the jury reach a decision based on reasoned judgment rather than speculation. *Cf. Bruton* v. *United States,* 391 U.S. 123, 135 (1968) (in some contexts, jurors cannot be expected to follow jury instructions).

In summary, due process of law does not give a criminal defendant a license to throw any and everything before a jury. In balancing the defendant's interest in presenting evidence and the state's interest in preserving the jury's truth-finding power and its concomitant ability to render rational decisions, this Court should consider the reliability of the defendant's proffered evidence. If the defendant's evidence is so lacking in the potential to be true that the jury must guess if it is is true, then the due process clause does not require the admission of such evidence. Testimony that is the product of a hypnotically enhanced memory is inherently unreliable and a hypnotically refreshed witness projects such certainty in the truth of his or her testimony that jurors cannot rely on their normal, common sense ability to tell truth from falsehood. Unlike the testimony of a witness who lies, a hypnotically refreshed witness' testimony can become a seamless web of falsehood that the state cannot unravel by cross-examination or by contradictory testimony. Given that, a jury has no logical or common sense way to tell if a hypnotically refreshed witness is telling the truth, hypnotically refreshed testimony threatens the jury's ability to find the truth and to return verdicts based on reason. Because Arkansas' interest in rational jury verdicts ought to outweigh Rock's due process right to introduce inherently unreliable testimony, this Court should affirm the Arkansas Supreme Court's decision.

D. *If the trial court's restriction of Rock's testimony was error, then the error was harmless.*

On review by certiorari of affirmances by state appellate courts in criminal cases, this Court will not determine anew the existence of historical facts. *See Watts* v. *Indiana*, 338 U.S. 49, 50-1 (1949). However, where inferences drawn from historical facts bear on the infringement *vel non* by the state of a defendant's constitutional rights, then this Court will analyze the facts of the case, such as they are, to see if the

defendant's constitutional rights were denied. *Drope* v. *Missouri*, 420 U.S. 162, 174-75 (1975); *Watts* v. *Indiana, supra;* and *Norris* v. *Alabama*, 294 U.S. 587, 590 (1935).

Given the facts of the instant case, respondent Arkansas submits that if Rock's due process right to testify in her own defense was infringed, then the error was harmless. Rock did, in fact, testify. The trial court applied its order restricting Rock's tesitmony in a very lenient way that gave Rock great latitude before the jury. Rock was able to tell the jury that the dispute with her husband began when they were at home and when he refused to let her have some pizza and refused to let her leave the room. (J.A. 98; J.A. 104) Rock was able to tell the jury that her husband pushed her against the wall and hit her. (J.A. 99; J.A. 101-02) Rock was able to tell the jury that her husband's behavior on the night in question was unusual. (J.A. 102) Rock was able to tell the jury that her husband's death was an accident, that she did not intentionally shoot her husband and that she never pointed the gun at him. (J.A. 105; J.A. 107) Rock was able to tell the jury that she had never before shot the pistol that she used to shoot her husband. (J.A. 101) The jury was told repeatedly in the State's case that Rock had told police officers who had questioned her just after the incident that her husband had choked and beaten her and that the shooting was an accident. (T. 281; T. 301-4; T. 337-38; J.A. 3-10; T. 381; T. 388)

Given the great detail of her testimony and the testimony of her expert witness, who established that the pistol at issue could have discharged accidentally (T. 662-63; T. 671-78), Rock was able to place her version of her husband's death before the jury in sufficient detail for the jury to know her version — an accidental death in a struggle over a pistol — and to compare her version of the incident to the State's evidence. That the jury resolved the matter of credibility against Rock is not attributable to her inability to place her story before the

jury. This Court may hold that a state's infringement of a criminal defendant's constitutional rights was harmless error. *Chapman* v. *California*, 386 U.S. 18, 22 (1967); *see also Delaware* v. *Van Arsdall*, 475 U.S. ___, 106 S.Ct. 1431, 1435-8, 89 L.Ed. 674, 683-87 (1986). Respondent Arkansas submits that if the trial court's restriction of Rock's due process right to testify was error, given the detail of the testimony she was allowed to present and the testimony from her expert, then the error was harmless.

II.

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW IN THAT THE PRETRIAL ORDER OF THE COURT WAS NOT AN UNCONSTITUTIONAL LIMITATION ON PETITIONER'S RIGHT TO EFFECTIVE COUNSEL AND THE PREPARATION OF HER DEFENSE.

For her second allegation of error petitioner Rock argues that the Arkansas Supreme Court decision at issue violates her Sixth and Fourteenth Amendment due process right to the effective assistance of counsel. Specifically, Rock argues that the Arkansas Supreme Court's decision interferes with her due process right to have meaningful consultations with her attorney in order to prepare her defense. Rock cannot pursue this issue on review by certiorari before this Court because she did not follow proper appellate procedure before the Arkansas Supreme Court and, in any case, the issue is moot.

Respondent Arkansas notes that the Arkansas Supreme Court did not decide this issue. With respect to the "hypnotic-refreshment-of-testimony" issue, the Arkansas Supreme Court addressed itself to the admissibility of hypnotically refreshed testimony, the trial court's application of its pretrial order excluding Rock's hypnotically refreshed testimony and Rock's Sixth and Fourteenth Amendment due process right to testify in her own defense. The Arkansas Supreme Court did not address any "right-to-consult" issue because Rock did not raise this issue in her brief to the Arkansas Supreme Court, although she did touch on such a right in a pretrial brief to the trial court. (T. 33) In Arkansas, as a matter of appellate practice, issues not argued on appeal are considered waived. *Shockley* v. *State*, 282 Ark. 281, 668 S.W.2d 22 (1984) and *Smith* v. *State*, 264 Ark. 329, 333, 571 S.W.2d 591, 593 (1978). Because Rock failed to follow Arkansas' appellate procedure, she cannot pursue

this issue before this Court on review by writ of certiorari. *Beck* v. *Washington*, 369 U.S. 541, 549-54 (1962); *Wolfe* v. *North Carolina*, 364 U.S. 177, 195 (1960); and *John* v. *Paullin*, 231 U.S. 583, 585 (1913). Rock cannot argue that the trial court or the Arkansas Supreme Court must necessarily have decided the "right-to-consult" issue when they decided that her hypnotically refreshed testimony was inadmissible; whether a defendant's testimony is admissible at trial is not the same issue as whether the defendant had an adequate opportunity to consult with counsel in order to prepare a defense before trial. *See Cornell* v. *Superior Court*, 52 Cal. 2d 99, 338 P.2d 447 (1959).

Furthermore, respondent Arkansas notes that this issue is moot. Because Rock never bothered to give notice to the trial court of her intention to have herself hypnotized, she was free to do so and afterwards to consult with her attorney in any way she saw fit. Rock *was* hypnotized before trial. As a result of the hypnosis, Rock was able to provide information to her attorney that was useful in preparation of her defense. The Arkansas Supreme Court's decision in no way impeded Rock's ability to consult with her attorney *before* trial — the Arkansas Supreme Court's decision could not have interfered with Rock's right to effective assistance of counsel because the Arkansas Supreme Court handed down its decision over two years after the fact of Rock's pretrial hypnosis. This Court does not render opinions on moot issues. *See University of Texas* v. *Camenisch*, 451 U.S. 390 (1981); *North Carolina* v. *Rice*, 404 U.S. 244 (1971); and *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-41 (1937). Because Rock is presently aware of the information that was the product of her hypnotic refreshment and because Rock is presently able to use this information in consultation with her attorney to prepare a defense against any future retrial for the instant offense, any interference with Rock's right to effective assistance of counsel caused by the Arkansas Supreme Court's decision is not capable of repe-

tition. *Cf. Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (denial of pretrial bail mooted by appellee's conviction) and *Roe* v. *Wade*, 410 U.S. 113, 125 (1973) (abortion litigation not mooted by end of pregnancy).

Moreover, in her argument under this heading Rock has not set forth one specific allegation of prejudice; she has not shown how the Arkansas Supreme Court's decision impaired her ability to consult with counsel before trial such that her defense was prejudiced at trial. Rock's right to testify was curtailed, but this restriction had nothing to do with her right to effective assistance of counsel. Because this Court does not reverse on the basis of harmless error, *a fortiori*, it should not reverse where the petitioner has failed to even make an allegation of prejudice. *See Rushen* v. *Spain*, 464 U.S. 114, 120 (1983) (harmless error) and *Frazier* v. *Cupp*, 394 U.S. 731, 735-36 (1969) (harmless error).

III.

THE LIMITATION OF PETITIONER'S TESTIMONY TO PRE-HYPNOTIC STATEMENTS MADE TO THE HYPNOTIST WAS NOT ARBITRARY AND UNREASONABLE TO THE EXTENT THAT IT VIOLATED DUE PROCESS OF LAW.

For her third allegation of error petitioner Rock argues that the Arkansas Supreme Court erred in affirming the trial court's decision to exclude from the evidence before the jury a police officer's probable cause statement. Rock offered the statement as defendant's exhibit number seven. (J.A. 105) The statement contained prior, out-of-court statements made by Rock to a police officer just after she had been arrested. (J.A. 106-07) On appeal to the Arkansas Supreme Court Rock argued that her prior statement to the police officer was admissible as non-hearsay pursuant to Ark. Unif. R. Evid. 801(d)(1)(ii) to rebut an implied charge of recent fabrication. (Rock's Arkansas Supreme Court brief at Vol. IV, 149-50) Rock did not explicitly put to the trial court or to the Arkansas Supreme Court an "arbitrary classification" argument as a basis for the admissibility of her prior out-of-court statements contained in the probable cause statement. She raises this argument in favor of the admissibility of her prior statements in the probable cause statement for the first time before this Court. Because Rock did not raise this point at the trial court level, she failed to comply with Arkansas' contemporaneous objection rule. *See Fretwell* v. *State*, 289 Ark. 91, 98, 708 S.W.2d 630, 634 (1986) and *Wicks* v. *State*, 270 Ark. 781, 785-87, 606 S.W.2d 366, 369-70 (1980). Because Rock did not comply with Arkansas' contemporaneous objection rule, as a matter of Arkansas appellate procedure she could not have raised this issue on appeal to the Arkansas Supreme Court. *Fretwell, supra.* If a petitioner completely fails to make a proper objection in state court to an alleged violation of one of his

rights guaranteed by the United States Constitution, this Court will not consider an argument addressing the alleged deprivation when raised for the first time before this Court on review by writ of certiorari. *Moore* v. *Illinois*, 408 U.S. 786, 799 (1972); *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969); and *Street* v. *New York*, 394 U.S. 576, 582 (1969). Arkansas' interest in requiring contemporaneous objections at trial is a legitimate state interest and is not simply an illegitimate means to deny criminal defendants the opportunity to vindicate their constitutional rights. *See Wainwright* v. *Sykes*, 433 U.S. 72, 88-90 (1977) and *Henry* v. *Mississippi*, 379 U.S. 443, 448-49 (1965).

In any case, the record reveals that Rock was not limited to her hypnotist's intake notes with respect to establishing her pre-hypnosis recollection. The trial court permitted Rock to tell the jury, in great detail, aspects of her past and of her marriage to her late husband. (T. 809-40) This testimony by Rock was not a part of her hypnotist's intake notes. Furthermore, Rock's out-of-court statements that her husband had choked and beaten her that were reported in the probable cause statement (J.A. 106-07) were introduced into evidence as part of the State's case-in-chief in Police Officer Strickland's report of his questioning of Rock at the police department. (T. 275-77; J.A. 3-10; T. 381; T. 388) This testimony recounted Rock's pre-hypnosis statement to the police that her husband's death was an accident. In addition, even though the probable cause statement was not admitted, the trial court permitted a police officer to read Rock's out-of-court statements contained in the probable cause statement to the jury as part of Rock's case. (T. 802) Just to make sure, Rock's trial counsel also read the pertinent part of Rock's out-of-court statement contained in the probable cause statement to the jury while cross-examining a police officer. (T. 805) The exclusion of evidence cannot be considered prejudicial if the same evidence was introduced by another witness and was before the jury for its consideration.

Drumm-Flato Commission Co. v. *Edmisson*, 208 U.S. 534, 538 (1908).

Respondent Arkansas submits further that with respect to the events that occurred on the day Rock shot her husband and, specifically, with respect to what happened when he was shot, Rock was able to tell her story to the jury in such detail that her due process right to testify in her own defense was not unduly restricted. See Section I(D) of respondent Arkansas' brief on the merits, *supra*. The ability of Rock to put this testimony before the jury proves that the trial court's order restricting Rock's testimony to those things she related to her hypnotist in a pre-hypnosis interview was not enforced in an illogical, arbitrary or overly strict way. *Cf. Washington* v. *Texas*, 388 U.S. 14, 22-3 (1967). The trial court tried to keep out only that part of Rock's testimony that could have been tainted by hypnotic refreshment. The record shows that the trial court was well aware that Rock would be entitled to "reasonable latitude" (J.A. 36) in describing the events leading up to the moment in which she shot her husband. As the Arkansas Supreme Court noted, the trial court applied its order restricting Rock's testimony in an extremely lenient, generous way that allowed Rock to tell her story to the jury witout including unreliable, hypnotically refreshed testimony. (Rock's certiorari petition at xi).

IV.

THE APPLICATION OF THE PRETRIAL ORDER AT THE TRIAL DID NOT DENY PETITIONER DUE PROCESS OF LAW.

For her fourth allegation of error petitioner Rock seems to argue that her due process right to a fair trial was violated by the State's numerous objections during her direct examination and by the trial court's repeated efforts to clarify the scope of its restriction on her testimony. Neither of these objections was specifically raised at trial or argued on appeal. The Arkansas Supreme Court, perforce, did not decide either issue. Far from complaining of the trial court's efforts to clarify the scope of its ruling, Rock's trial counsel said that he understood the trial court's explanations. (J.A. 15-7; 24) Because Rock did not present these arguments to the state trial court below, she failed to comply with Arkansas' contemporaneous objection requirement. *See Fretwell* v. *State*, 289 Ark. 91, 98, 708 S.W.2d 630, 634 (1986). Because Rock did not comply with Arkansas' contemporaneous objection requirement, she cannot pursue these issues before this Court on review by writ of certiorari. *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969); *see also Wainwright* v. *Sykes*, 433 U.S. 72, 88-90 (1977).

CONCLUSION

Respondent, the State of Arkansas, respectfully requests that this Honorable Court deny petitioner Rock's petition for a writ of certiorari to the Arkansas Supreme Court, that this Honorable Court deny her any relief whatsoever and that this Honorable Court affirm the decision of the Arkansas Supreme Court reported in *Rock* v. *State*, 288 Ark. 566, 708 S.W.2d 78 (1986). In so affirming *Rock, supra*, respondent Arkansas respectfully requests that this Court hold that a criminal defendant does not have a due process right to testify after hypnotic refreshment of his or her memory. Alternatively, respondent Arkansas requests that this Court affirm *Rock, supra*, by holding that due process of law requires certain procedural safeguards be strictly followed when potential witnesses in criminal trials have their memories hypnotically refreshed before trial and that the safeguards were not properly followed in the instant case. Alternatively, respondent Arkansas respectfully requests that this Court affirm *Rock, supra*, on the basis of the harmless error doctrine.

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